



GRAND DUCHY OF LUXEMBOURG
Embassy in Washington, D.C.

EXHIBIT 2
DATE 3-11-13
HB 578

March 7, 2013

The Honorable Mike Miller
Chair, Committee on Taxation
Montana House of Representatives
Helena, MT 59620-0400

L37-13

Re: HB 578, An Act Entitled "An Act Eliminating the Listing of Countries that are Considered a Tax Haven for Corporation License Tax and the Water's Edge Election"

Dear Chairman Miller:
Dear Members of the Taxation Committee:

I take the liberty to draw your kind attention upon the ongoing discussion at the Montana House of Representatives regarding the aforementioned legislation HB 578:

The State of Montana currently identifies the Grand Duchy of Luxembourg as a tax haven for purposes of the state's water's edge statute under MCA § 15-31-322(1)(f).

As required by state law, the Interim Revenue and Transportation Committee held hearings last year to determine the accuracy of the state's list of tax havens. The Government of Luxembourg appeared before the Interim Committee to testify, and further supplied written comments. For the Committee's convenience, those written comments are appended to this letter as Attachment 1.

The purpose of my present letter is to support of HB 578, which proposes to remove references to tax havens in the existing statute.

In its decision to identify Luxembourg as a tax haven, the State of Montana happens to stand alone: Neither the federal Government, nor any other State or local Government identifies Luxembourg in such a manner, be it by legislative or

by administrative act. Indeed, to the Embassy's knowledge, no other state has identified alleged tax havens for the purposes of tax administration.

The reason is obvious – doing so stands in contradiction to international relations and practices. Luxembourg and the United States have a longstanding partnership in the economic and financial sectors. Our two countries are linked by a bilateral taxation treaty that is fully compliant with OECD stipulations. Luxembourg's banks participate in the U.S. Treasury Department's Qualified Intermediary program. Furthermore, we are currently negotiating an agreement with the Federal Government under FATCA.

In 2011 (the most recent year for which data are available), Luxembourg ranked as the third largest source of foreign direct investment in the United States.¹ Luxembourg, who is a founding member of the European Union, has a free market economy which is open to the world. Being mischaracterized by the State of Montana in this way is harmful to Luxembourg, and could bring harm to the economy of Montana by discouraging foreign investments.

We feel that the fact of Luxembourg being retained on the list of bad financial actors is particularly galling since it is a statement wholly unsubstantiated by evidence. As we have previously demonstrated, Luxembourg does not belong on Montana's list of tax havens. Indeed, as demonstrated in Attachment 1, the sole law identified in the Montana Department of Revenue's explanatory memoranda (as opposed to non-specified "reputational evidence") as the basis for Luxembourg's suspect status was Luxembourg's statute regarding "Holding Companies" under the laws of 1929 and 1938.² These laws were repealed by the legislature in 2006, in response to a European Union proceeding,³ and have completely ceased to have any effect since January 1st, 2011.

Multiple sources confirm that Luxembourg has a transparent financial and fiscal system, and cooperates fully and effectively with the United States on exchanges of tax information. The best multilateral source on this point is the Global Forum on Transparency and Exchange of Information for Tax Purposes. This forum is run under the auspices of the OECD, and has been endorsed by the G-20 for its efforts in fighting tax evasion and tax havens.

¹ E.g., Organization for International Investment, *Foreign Direct Investment in the United States* at 2 (Mar. 14, 2012).

² As noted in Attachment 1, the sources cited by the Department of Revenue in its Memoranda of November 10, 2010 do not support the proposition for which they are cited. For example, the November 2010 Memorandum at pages 2 and 14 relies upon a 2000 OECD Report that identifies Luxembourg as having a "potentially preferential tax regime." (Luxembourg was not identified by this OECD Report as a tax haven.) The preference in question was the treatment of the so-called "1929 Holding Companies." This preference was removed in 2006.

³ Loi de 22 décembre 2006, Memorial A. No. 241 (29 décembre 2006); European Commission Decision 2006/940/EC.

Luxembourg is fully committed to this process. We did successfully pass the Phase 1 review (reviewing laws in place).⁴ The draft Phase 2 report (reviewing the implementation of these laws) will be examined by the Peer Review Group in June, and should be published by the Global Forum in August, 2013.

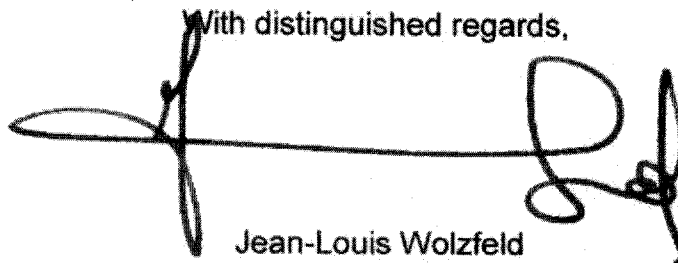
The Embassy is, of course, at the Committee's disposal for providing any information that would be helpful to its proceedings. Should you require any additional information, please do not hesitate to contact my advisor, Ms. Jennifer Riccardi, at 202.265.4171 or jennifer.riccardi@mae.etat.lu.

We appreciate the efforts of HB 578's sponsors, and applaud their efforts to bring Montana's laws in line with the rest of the States of the Union. We welcome your consideration of these comments, and respectfully request that those be included on the official record and distributed to the rest of the House Committee on Taxation.

We are filing concurrent comments with the Senate Committee on Taxation, which is considering a related bill.

Please accept, dear Chairman Miller, the assurances of my highest consideration.

With distinguished regards,

A handwritten signature in black ink, consisting of a large, stylized 'J' followed by a horizontal line and a series of loops and flourishes.

Jean-Louis Wolzfeld
Ambassador of the Grand Duchy of
Luxembourg to the United States of America

Enclosures

cc: The House Committee on Taxation
Rebecca Shaw, Committee Secretary

⁴ Attachment 1 at 8; OECD, *Global Forum on Transparency and Exchange of Tax Information for Tax Purposes Peer Reviews: Luxembourg*.

ATTACHMENT ONE

The Montana Code identifies Luxembourg as a tax haven for purposes of the state's water's edge election.¹ According to a November 10, 2010 Department of Revenue document, this characterization is based on several research papers, as well as a U.S. Internal Revenue Service (IRS) affidavit filed in the 2005 PayPal litigation in the U.S. District Court for the Northern District of California.² For the reasons explained below, these sources are outdated and invalid, and do not support the determination that Luxembourg is a tax haven. Moreover, a more recent multilateral source – the OECD's Centre for Tax Policy and Administration - confirms that Luxembourg meets its international obligations to effectively share tax information. What may have been true in the distant past is no longer valid, and Luxembourg should be removed from the list of tax havens codified in Montana state law.

MONTANA'S IDENTIFICATION OF LUXEMBOURG AS A TAX HAVEN IS BASED ON OUTDATED SOURCES AND MISCHARACTERIZED EVIDENCE

The Gilmer Memo identifies several sources for its contention that Luxembourg is properly characterized as a tax haven. As demonstrated below, none of this evidence supports that contention.

First, the Gilmer Memo notes that "the list of tax havens in 15-31-322, MCA, was developed primarily, but not exclusively from the Organization for Economic Co-Operation and Development (OECD)."³ At Page 14, a table claims

¹ Section 15-31-322(1)(f) MCA (2009).

² Memorandum from Brenda J. Gilmer, Senior Tax Counsel to Dan R. Bucks, Director of Revenue, "Corporation Tax Water's Edge Election – Tax Haven Countries" at 14-15 (Nov. 10, 2010) ("Gilmer Memo").

³ *Id.* at 2.

that a 2000 OECD report identified Luxembourg as "having a potentially harmful preferential tax regime." While the 2000 OECD Report does identify countries that met, at that time, the OECD's definition of a "tax haven," *Luxembourg is not included on that list.*⁴ A designation as a "potentially harmful preferential tax regime" worthy of additional investigation is not the same as an OECD designation of being a tax haven and should not be treated in the same manner – particularly when the "potential preference" identified by the OECD Report has been subsequently revoked by the country in question.⁵

Second, the Gilmer Memo notes Luxembourg's inclusion in a list of tax havens published in a working paper published by the National Bureau of Economic Research in 2006.⁶ This list was derived from a 1994 paper that identified tax havens by "the coexistence of low business tax rates in a jurisdiction in 1982 and its identification as a tax haven by multiple authoritative

⁴ Committee on Fiscal Affairs, Organization for Economic Co-Operation and Development, "Towards Global Tax Co-operation: Report to the 2000 Ministerial Council Meeting and Recommendations" at 17 (2000) ("OECD 2000"); *see also* Congressional Research Service, "Tax Havens: International Tax Avoidance and Evasion" at 4, notes b and e (Sept. 3, 2010) (Luxembourg not included on original OECD list and is currently on the White List). The OECD briefly included Luxembourg on its grey list of "non-cooperative jurisdictions" in 2009. Luxembourg was removed from that list within a matter of months, following its swift implementation of OECD standards on the exchange of information. OECD, "Luxembourg makes progress in OECD standards on tax information exchange" (July 8, 2009).

⁵ The OECD 2000 report did note that Luxembourg had a potentially preferential tax regime regarding its treatment of "1929 Holding Companies." OECD 2000 at 13, 15. Indeed, several EU partners likewise considered this unfair tax competition. Following a European Commission decision characterizing the regime as impermissible state aid, Luxembourg abolished the provision in 2011. *E.g.*, PLMJ, "Updating of the Portuguese Tax Haven Blacklist" (Nov. 2011). Portugal maintains a list of tax havens; Luxembourg was at one time included solely for its treatment of 1929 Holding Companies and has since been removed from the list. *Id.*

⁶ Gilmer Memo at 14, note 30, citing Dharmapala & Hines, "Which Countries Become Tax Havens," NBER Working Paper 12802 (Dec. 2006) ("NBER 2006").

sources.”⁷ The NBER paper does not identify these supposedly authoritative sources nor does it attempt to update the thirty year old tax rate research. Not surprisingly, tax rates have changed in Luxembourg over the course of thirty years. Indeed, in the United States, the highest federal corporate tax rate was 46% in 1982, and had dropped to the current 35% by 1993.⁸ In Luxembourg, the corporate tax rate was 39.39% in 1993.⁹ *Most notably, the 2006 NBER source relied upon in fact acknowledges that under the OECD definition, Luxembourg cannot be considered a tax haven.*¹⁰ The sources cited simply do not support the conclusion reached in the Gilmer Memo.

Third, the Gilmer Memo notes that Luxembourg was included on a list of jurisdictions for which the United States sought permission to issue a John Doe Summons on PayPal.¹¹ The petition was supported by a declaration from an IRS agent that the 34 jurisdictions included were recognized as “principal offshore tax haven or financial privacy jurisdictions.”¹² A subsequent Government Accounting Office Congressional Report explains that, according to the IRS, the list was developed for a research project, not official use, and “was developed many

⁷ NBER 2006 at 8.

⁸ Tax Policy Center, Historical Corporate Top Tax Rate and Bracket: 1909-2010 <<http://www.taxpolicycenter.org/taxfacts/displayafact.cfm?Docid=65&Topic2id=70>>.

⁹ KPMG’s Corporate and Indirect Tax Rate Survey 2007 at 7-8; see also European Commission, European Economy, Economic Papers 250 at 18 (June 2006). We have been unable to find publicly available data for the Luxembourgish corporate tax rate in 1982.

¹⁰ NBER 2006 at 29 (explaining tax haven status methodology) and 32 (excluding Luxembourg from the “tax haven” column).

¹¹ Gilmer Memo at 14, note 31.

¹² *Id.*

years ago.”¹³ Holding aside the fact that lawyers seek as broad of discovery as possible in litigation, the *U.S. government does not believe the list is an accurate list of tax havens*. As described by the then-Deputy Assistant Secretary for International Tax Affairs:

The list of jurisdictions in that summons was put together for a very specific purpose and was not at all intended to suggest a general list of jurisdictions that the Treasury Department and IRS consider tax havens. Moreover, the specific nature of the John Doe Summons – which focused on individual taxpayers – makes use of the list of countries in that summons all the more inapposite since the draft GAO report deals not with individuals but with foreign subsidiaries of U.S. corporations. Because the problems identified in the draft report and the John Doe Summons are so different, it is unclear what relevance the list of countries in the John Doe summons has in the context of the report. For these reasons, we requested that the GAO not use the summons list as a source for its tax havens list. Moreover, we are concerned that such use will lead others to believe that the Treasury Department intended the summons list to be a list of tax havens.¹⁴

It is similarly inapposite for the Montana Department of Revenue to rely on this list.

Fourth, the Gilmer Memo relies upon a report from the Financial Stability Forum, claiming that this document identifies Luxembourg as a tax haven.¹⁵ This is simply a mischaracterization of the document. The FSB Working Report does not purport to identify tax havens nor does it render judgments of any kind.

Rather, the Working Party was convened to consider the significance of offshore

¹³ GAO, “International Taxation: Large U.S. Corporations and Federal Contractors with Subsidiaries in Jurisdictions Listed as Tax Havens or Financial Privacy Jurisdictions,” GAO-09-157 at 11, n. 12 (Dec. 2008) (“GAO Report”).

¹⁴ Letter from Michael Mundaca, Deputy Assistant Secretary International Tax to James R. White, Director, Tax Issues, General Accounting Office at 2 (undated), appended to GAO Report at Appendix IV.

¹⁵ Gilmer Memo at 14, n. 32, citing Report of the Working Group on Offshore Financial Centres (April 5, 2000) (“FSB Report”).

financial centers (OFC) in relation to financial stability.¹⁶ The Working Party sent questionnaires to both "offshore financial centers" (37 jurisdictions) and to "major financial centers" (30 jurisdictions).¹⁷ Luxembourg received and responded to a "major financial center" questionnaire, along with the United States, the United Kingdom, Germany, Italy and Canada. *The Working Group did not consider Luxembourg an OFC, let alone a tax haven, but simply a major financial centre, the same characterization as the United States.*

Even if the Working Group had included Luxembourg in the offshore list, that in and of itself is not an indication of a country's status as a tax haven. For example, the Working Group included Barbados on its OFC list, but Barbados is omitted from MCA 15-31-322. As the working group notes:

Not all OFCs are the same. Some are well supervised and prepared to share information with other centres, and co-operate with international initiatives to improve supervisory practices.¹⁸

There are . . . highly reputable OFCs that actively aspire to and apply internationally accepted practices, and there are some legitimate uses of OFCs.¹⁹

The prudential and market integrity concerns raised by problematic OFCs – lack of cooperation, weak supervision, lack of due diligence²⁰ – simply do not apply to Luxembourg, as demonstrated *infra*.

Fifth, the Gilmer Memo cites a list prepared by the Tax Justice Network (TJN).²¹ This list was a compilation of the OECD and FSB lists discussed above,

¹⁶ FSB Report ¶1.

¹⁷ *Id.* at 14, Table 1.

¹⁸ *Id.* ¶5.

¹⁹ *Id.* ¶19.

²⁰ *Id.* ¶7.

as well as "reputational" tax havens identified by TJN's members.²² As such, this source suffers from the same flaws identified above – neither the OECD nor the FSB identify Luxembourg as a tax haven and the "reputational sources" are extremely out of date.

TJN published a new study in 2011, the "Financial Secrecy Index" that identifies Luxembourg as a "financial secrecy jurisdiction." Much of the "evidence of secrecy" relied upon can be reduced to the simple fact that Luxembourg is a major financial center, and the second biggest home of mutual funds in the world, second only to New York City. Indeed, the fact that there are four large accounting firms in Luxembourg City is treated as evidence of nefarious activity, rather than evidence of audits and transparency. Secrecy points are assessed because trusts are not recorded on the public record, even though there are no trusts under Luxembourgish law.²³ The Luxembourg vehicle is a "family office," and relevant details are indeed recorded and publicly available. TJN incorrectly reports that Luxembourg has signed only five OECD compliant double tax treaties, when in fact Luxembourg has bilateral exchange mechanisms in place with more than 68 jurisdictions, 27 of which have been negotiated since March 2009 and are fully compliant with OECD Art. 26. *See infra*. The TJN report is neither authoritative nor credible and should not be the basis of the Committee's decision.

²¹ Gilmer Memo at 14, citing 2005 List of the Tax Justice Network.

²² *Id.* at 8.

²³ Association des Banques et Banquiers, Luxembourg, "Luxembourg is not a 'secrecy jurisdiction' (Feb 11, 2009) (www.abbl.lu/print.2349); J-J Picard, "How to Put Your Story Across – even if its fiction" (Oct. 5, 2011) (blog.iff.lu).

LUXEMBOURG DOES NOT MEET THE OECD'S DEFINITION OF A TAX HAVEN

Virtually all of the sources identified above describe a tax haven by reference to four key identifying factors:

1. No or only nominal taxation;
2. Lack of effective exchange of information;
3. Lack of transparency; and
4. No substantial activities.

Luxembourg cannot be deemed to qualify as a tax haven under any of these factors.

Luxembourg's corporate tax rate. A key hallmark of a tax haven is that it attracts investment by imposing no or only minimal taxes. This is simply not true in Luxembourg, where the national corporate tax rate is 21%, there is a surtax of 5% for the unemployment fund, and there is a minimum flat tax in effect.²⁴ Most transnational businesses locate in the city of Luxembourg, which imposes a local tax of 6.75%, for a combined tax rate of 28.80%.²⁵ While not as high as the combined U.S.-Montana tax rate, this cannot be characterized as nominal – especially when it is considered that corporations are also subject to a value added tax of up to 15%, while a corporation in Montana would not be subject to any corresponding sales tax. As concluded by PriceWaterhouseCooper “the country cannot be deemed to be of low or nil taxation. This was confirmed, both by the OECD and by the G20 summit held in London on 2 April 2009.”²⁶

²⁴ E.g., Deloitte, “International Tax: Luxembourg Highlights 2012” at 1.

²⁵ ICLG, Corporate Tax 2012 (www.iclg.co.uk).

²⁶ PriceWaterhouseCoopers, “Summary of recent Luxembourg Government’s statements on tax related matters” (April 27, 2009) <www.pwc.com.lu>.

Luxembourg engages in effective exchange of information. In late 2011, the OECD's Centre for Tax Policy and Administration published a Phase I peer review of Luxembourg on behalf of the Global Forum on Transparency and Exchange of Information for Tax Purposes. The Peer Review found:

Since its commitment to the international standard of transparency and exchange of information in March 2009, Luxembourg has been very active and quick in negotiating exchange of information mechanisms that incorporate the full and generally consistent version of article 26 of the OECD Model Tax Convention.²⁷

In order to conform to the international transparency standard, Luxembourg recently introduced legislation, and in particular a new law governing access to banking information or information protected by secrecy rules. This legislation implements Luxembourg's international commitments into domestic law.²⁸

Banking information is, in particular, available thanks to the anti-money laundering (AML) legislation.²⁹

Luxembourg law guarantees the availability of information on companies and partnerships.³⁰

The Peer Review praised Luxembourg for quickly seeking to negotiate bilateral information exchange mechanisms.³¹ Luxembourg's network covers 68 jurisdictions, 27 of which fully implement OECD standards. Luxembourg was quick to ratify the first 20 treaties signed, 17 of which are now in force.

²⁷ OECD, *Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Luxembourg 2011* ¶12.

²⁸ *Id.* ¶4.

²⁹ *Id.* ¶5. The law of 31 March 2010 allows for the waiver of banking secrecy provisions in financial and tax legislation. Such information is accessible for those bilateral agreements allowing for this possibility. *Id.* ¶ 182.

³⁰ *Id.* ¶6.

³¹ *Id.* ¶¶ 214-219.

Luxembourg has long had a double taxation treaty with the United States,³² and participates in the Qualified Intermediary (QI) program with the Treasury Department.³³ The QI program provides the IRS assurance that tax on U.S. source income sent offshore is properly withheld and reported, and indicates that the United States government approves of another nation's "Know Your Customer" rules.³⁴

In addition, Luxembourg and the United States negotiated a protocol to the existing tax treaty implementing the OECD standard.³⁵ As stated in the letter of submittal to the President, the Protocol "provides for more robust exchange of information . . . [that] generally follow[s] the current U.S. Model Income Tax Convention and the Organization for Economic Cooperation and Development standards for exchange of information."³⁶ Luxembourg has already ratified this protocol. The U.S. Senate Foreign Relations Committee favorably voted the Protocol out of committee; it is awaiting a full vote by the Senate pending the release of a hold placed on the legislation (and many other bits of Committee business) by one Senator.³⁷

As reported by the BBC, after the 2008 financial crisis:

³² Luxembourg Double Taxation: Taxes on Income and Property, entered into force December 22, 1964, available at www.irs.gov/pub/irs-treaty/luxem.pdf.

³³ See e.g. www.irs.gov/pub/irs-try/luxembourg-lates-attachment.pdf.

³⁴ GAO, "Tax Compliance: Qualified Intermediary Program Provides Some Assurance that Taxes on Foreign Investors are Withheld and Reported, but Can Be Improved," GAO-08-99 (Dec. 2007).

³⁵ Protocol Amending the Tax Convention with Luxembourg, Treaty Doc. 111-8.

³⁶ Letter from Hillary Clinton, Secretary of State to the President (Aug. 3, 2010).

³⁷ See Treaty Doc. 111-8, Senate History, available at www.thomas.gov.

Luxembourg responded by taking steps to improve the transparency of its financial arrangements. By July 2009 it had signed agreements on the exchange of tax information with a dozen countries and was commended by the OECD for its prompt efforts to implement the internationally agreed standard.³⁸

Luxembourg has significantly improved the efficiency and effectiveness of its information exchange with both the United States and third countries. These improvements should be recognized by the Montana Department of Revenue.

Luxembourg's tax laws are fully transparent. The third OECD factor to be considered is whether there is a lack of transparency in the operation of legislative, legal, or administrative provisions of a country's tax laws.

Luxembourg is an open and transparent democracy. Legislation is published in the Official Journal, the *Annuaire Officiel d'Administration et de Legislation*. All legislative proceedings are open to public scrutiny. Administrative and regulatory decisions regarding tax decisions are reported there as well, while judicial decisions are reported in the *Repertoire Analytique du Droit Luxembourgeois*.³⁹

There is no reasonable basis to conclude that there is a lack of transparency in the domestic legal and regulatory regime

Luxembourg requires economic activity from firms incorporated in its territory. The final OECD factor is whether the state requires substantial economic activity from investors, the assumption being that jurisdictions without such a requirement may be attempting to attract investment that is simply tax driven. While some purported tax havens prohibit certain companies from doing

³⁸ BBC, Country Profile: Luxembourg <www.newsvote.bbc.co.uk> (downloaded March 27, 2012).

³⁹ Both the *Annuaire Officiel* and the *Repertoire Analytique* are available at <www.legilux.public.lu>.

business in their territory, Luxembourg requires economic activity. There is no Luxembourgish version of the Caribbean's "Ugland House," home to some 19,000 paper corporations. The only specific accusation to the contrary found in an internet search was a podcast made in September 2011 by the author of "Treasure Islands" (and an affiliate of the Tax Justice Network discussed above). In this podcast, he attempts to contrast the large, ornate headquarters for Arcleor Mittal, a large, domestic manufacturing entity with the alleged headquarters of iTunes Sarl, which he depicts as nothing but a brass mailbox labeled iTunes.⁴⁰ The allegation is spurious, and the claimant must have known he was literally around the corner from iTunes' front door. iTunes SARL employs dozens of people in Luxembourg, in a range of activities, and frequently advertises open positions. For example, when jobs.apple.com was visited on April 23, we noted that iTunes SARL in Luxembourg was seeking to hire an "iTunes Marketing Operations Manager" as well as interns to work on label relations. Simple mail drops require neither managers nor interns.

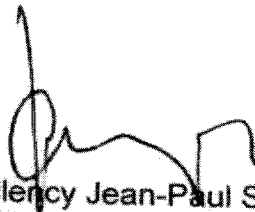
This is not to suggest that Luxembourg does not engage in some tax competition. Its VAT rate, for example, is less than that of neighboring Germany and its other economic powerhouse neighbors. Like all countries, it does seek to attract investment. But it also seeks jobs for its citizens and real economic growth.

It is notable that not a single source relied upon in the Gilmer Memo supports the conclusion that Luxembourg is a tax haven. Indeed, several of the

⁴⁰ E.g. <http://treasureislands.org/this-is-what-apple-itunes-europe-looks-like>.

sources reach expressly the opposite conclusion, as does more recent research. The simple truth is that the world is not the same now as it was four years ago. "{G}overnments increasingly engage in tax cooperation to reign in tax arbitrage and competition. While off to a slow start in the 1960s, tax cooperation has gained momentum in recent years, especially after the financial crisis in 2008."⁴¹ For all of these reasons, the Government of Luxembourg respectfully requests that the State of Montana remove Luxembourg from the list of tax havens identified in 15-31-322(1)(f) of the Montana Code.

Respectfully Submitted,



His Excellency Jean-Paul Senninger
Ambassadeur de Grand-Duchy de
Luxembourg

⁴¹ Phillip Genschel and Peter Schwarz, "Tax Competition: a Literature Review," *Socio-Economic Review* 9, 339 (Mar. 15, 2011).